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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/797,282

03/10/2004

David Kirchhoff

03968-P0001D

2941

24126

7590

10/11/2006

ST. ONGE STEWARD JOHNSTON & REENS, LLC
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EXAMINER

ASTORINO, MICHAEL C

ART UNIT

PAPER NUMBER

3736

DATE MAILED: 10/11/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/797,282

Applicant(s)

KIRCHHOFF ET AL.

Examiner

Michael C. Astorino

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 30 June 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-8, 11, 12, 14, 17, 18, 20-35, 38, 39, 41-60 and 62-74 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-8, 11-12, 14, 17-18, 20-35, 38-39, 41-60, and 62-74 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

The examiner acknowledges the amendment and remarks filed December 23, 2005.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-8, 11-12, 14, 17-18, 20-35, 38-39, 41-60, and 62-74 are rejected under 35 U.S.C. 102(e) as being anticipated by Mault et al. US Patent Number 6,513,532 B2 which incorporates by reference Mault 6,478,736 B1, see column 19, lines 1-36, unless otherwise stated the italicized portions cited below are directed to the Mault '736.

See previous office actions for details of the rejection.

Additionally, in regards the limitation in claims 1, 29, and 41, “crediting the participant with the difference value” and “adjusting the daily food consumption goal of a future day,” Mault et al. rejects the limitations. Mault et al. states the use of the Weight Watcher® program with diet and activity monitoring device (see column 15, lines 21-30). Weight Watchers program offers a eating program where the user can carry unused points from one day to the next, (also known as “Banking your Points”). See attached document

<http://mirror.sg.depaul.edu/pub/usenet-by-group/alt.answers/dieting-faq/part3> dated 9/14/2006.

The document is treated as extrinsic evidence to show inherency of the limitation in regards to

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the Weight Watchers® program.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 16 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mault et al. US Patent Number 6,513,532 B2 which incorporates by reference 6,478,736 B1, see column 19, lines 1-36, *unless otherwise stated the italicized portions cited below are directed to the Mault '736*, as applied to claim 14 above, and further in view of Kolawa et al. US Patent Number 6,370,513 B1.

See previous office actions for details of the rejection.

Claims 13, 40, 61 and 75 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mault et al. US Patent Number 6,513,532 B2 which incorporates by reference 6,478,736 B1, see column 19, lines 1-36, *unless otherwise stated the italicized portions cited below are directed to the Mault '736*, as applied to claim 14 above, and further in view of Abrams et al. US Patent Number 5,673,691 A.

See previous office actions for details of the rejection.

Response to Arguments

Applicant's arguments filed June 30, 2006 have been fully considered but they are not persuasive.

In regards to claims 1, 29, and 41 the examiner maintains his rejection. In regards the limitation in claims 1, 29, and 41, "crediting the participant with the difference value" and "adjusting the daily food consumption goal of a future day," Mault et al. rejects the limitations inherently via the Weight Watcher® as documented by the provided extrinsic evidence.

In regards to amended claims 14 and 49, it is the Examiner's position that Mault is time based since it is directed to daily consumption. Daily consumption is indicative of a 24 hour period and is therefore time based. Additionally, Mault meets the alternative of a time based non-structured meal plan.

In regards to claim 62, for the purpose of clarifying the Examiner's position the claim as recited includes a singular type of meal plan type not a plurality of meal plan types which is argued. Additionally any meal plan will be predetermined and have an associated number of carbohydrates, fats, protein, etcetera, since the user is ingesting food and food has such components inherently.

The Applicant is invited to contact the examiner to discuss the differences between the applied prior art and the Applicant invention.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

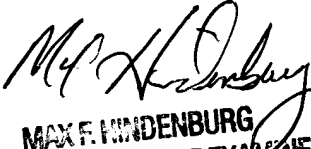
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael C. Astorino whose telephone number is 571-272-4723. The examiner can normally be reached on Monday-Friday, 8:30AM to 3:30PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Max Hindenburg can be reached on 571-272-4726. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Michael Astorino
September 30, 2006


MAX F. HINDENBURG
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 3700